IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 15

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, by
SIDNEY GOTTLIEB, Escheator, Appellee

Appeal From the Supreme Court of Pennsylvania

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

Our principal brief anticipates most of the objections to our argument raised in the appellee's brief. We failed, however, to anticipate certain assumptions which appear to be basic to the appellee's view of the case. Because these assumptions are unjustifiable, comment is called for.

1. Appellee's initial faulty assumption is that this case is concerned solely with obligations to make refunds to senders of money orders. There is a studied attempt in appellee's brief to ignore the fact that the vast majority of money order transactions result in the issuance of negotiable drafts and that 99% of the drafts are in the names of payees rather than senders (R. 29-30). The obligations involved in this case run only in very small part to senders of money orders. Though the notice published as part of the proceedings below referred only to sums "refundable to the senders" (R. 12), the sums sought to be escheated are almost entirely owed to others than senders.

In order to blink this fact, and to cover up the deficiency in the notice given, appellee's counter-statement of the case completely omits all reference to the negotiable drafts which were delivered to payees (in most of the instances here involved) or to senders (in almost all of the remaining instances). This omission, were it not so glaring, would give the case the appearance of being simply analogous to savings bank deposit cases, where the money is put in at one place and is to be paid back to the same person at the same place. Such over-simplification in the case at bar does not simplify, but obfuscates.

A money order transaction is not like a savings bank deposit, but quite the reverse. Its purpose is not to create

an obligation at the place of deposit but to create a new obligation, to the payee, elsewhere. When the payee is found and receives a negotiable draft, as occurred in most instances here involved, the new obligation is created. The sender can then get no refund (R. 27). The situation is then like that raised but not passed on in *Connecticut Mutual Life Insurance Co. v. Moore,* 333 U.S. 541, 549-550. The Court in that case held only that a state can escheat moneys due under non-negotiable insurance policies issued within the state under the state's laws and local regulations and payable upon the death of residents of the state to resident beneficiaries. The Court declined to rule on the state's power over interests of out-of-state beneficiaries, or even on policies of insureds who had moved elsewhere. In the case at bar we are concerned not only with rights of persons outside Pennsylvania but also with drafts, payable outside Pennsylvania and fully negotiable.

Perhaps the appellee's studied attempt to ignore the existence of negotiable drafts in this case is more than a mere attempt to domesticate the transactions in Pennsylvania. Perhaps the appellee is indirectly pressing this Court to say that Pennsylvania can declare that no new obligation arises when a payee is located and is given a negotiable draft. Constitutional limitations fortunately prevent the success of any such self-seeking distortion of the general law of negotiable instruments. The negotiable drafts involved in this case represent obligations to pay money at various banks, all of which are outside Pennsylvania. Pennsylvania cannot abrogate rights acquired outside its borders: *Home Insurance Co. v. Dick,* 281 U.S. 397, 410-411. Its attempt to ignore the rights of payees must fail.

2. A second faulty assumption basic to the appellee's argument is the idea that all a state has to do to effect an escheat is to declare that it has "sufficient contacts" with an obligation (whether as a matter of fact or as a matter of law) and get personal service on the obligee. This personal service, says the appellee, constitutes seizure of the obligation, and therefore the "sufficient contacts" are conclusively established. Such circular reasoning is unsound and unjustifiable.

The appellee's bootstrap theory is baldly set forth at page 14 of its brief as follows:

> "The Commonwealth of Pennsylvania has control of the obligations in this case because it can seize the obligations. It can seize the obligations because the appellant is subject to the jurisdiction of the courts of the state, and the service of process on the appellant effects such seizure."

This proposition can be put even more baldly: it is no less than an assertion that personal jurisdiction over a debtor, wherever found, is the only prerequisite to escheat of the debt. This is all the appellee means by its repeated references to "sufficient contacts." The result of appellee's reasoning would be the conclusion that all of the forty-eight states where Western Union does business have "sufficient contacts" to escheat the sums Pennsylvania now tries to grab.

This absurd result is reached at least in part through the incorrect view that the contacts needed for personal jurisdiction are identical with those required for the power to escheat. Power to assume personal jurisdiction, under the doctrine of *International Shoe Co. v. Washington*, 326 U.S. 310, is based not just on activity within a

state, but also upon the attendant protection furnished by the state's laws and its courts and upon considerations of fairness with respect to the defendant. The contacts which can justify an escheat by one state in preference to escheat by another must rest upon actual power to seize the *res* escheated and upon considerations of fairness with respect to owners and claimants, including other states, who are entitled to reasonable notice and a reasonable opportunity to be heard. The justification for escheat proceedings is entirely different from that for the assumption of personal jurisdiction, and the threshhold of fairness to be surmounted is necessarily higher.

It must never be forgotten that only one state can escheat a given obligation. Whether or not so denominated, every valid escheat proceeding is really *in rem*. Hence the insistence of the cases, cited at pages 19-20 of our brief, on the seizure of a *res* as a prerequisite. Nothing else can protect against a denial of due process or against the usurpation of rights of other states. "Sufficient contacts" for escheat are not the self-declared formalities which the appellee assumes them to be.

3. The appellee's careless approach to the question of adequate contacts leads it naturally to a disregard for adequacy of notice to those concerned in a taking by escheat. For this reason the appellee's argument on the subject of notice proceeds by a path of easy but faulty assumptions.

The initial misstep is, of course, the assumption that personal service is tantamount to seizure of a *res* and therefore to notice. After this *tour de force* the appellee does not hesitate to assert (Brief, p. 27) that "[t]he escheat statute itself is a form of notice." But this over-

looks the fact that in the case at bar, unlike *Anderson National Bank v. Luckett*, 321 U.S. 233, the Pennsylvania statute was not passed until 1953, after the rights accrued, after drafts became payable in states other than Pennsylvania, after the obligations had shifted out of Pennsylvania and the funds to satisfy them had been transferred to the appellant's domicile in New York.

Another faulty assumption on the subject of notice is that Western Union, rather than the escheator, had the duty to send mail notice to possible claimants. Allied to this is the theory that such notice was not mailed before the escheat proceedings began, either because Western Union wanted to wait for the period of limitations to bar the true owners or didn't mail notices because the whereabouts of the true owners could not be discovered.

To all such contentions short and conclusive rebuttal is to be found in the record. Western Union, though it might plead the statute of limitations to protect the rights of those better entitled, does not interpose this defense against true owners: note well the payment of a 1935 draft even while the amount thereof was being claimed by Pennsylvania (R. 31). Neither has Western Union at any time asserted that true owners, though their whereabouts might be presently unknown to it, could not be discovered. A postcard will be forwarded in many instances, giving actual notice to many owners whose whereabouts may be unknown to the sender of the card. The record demonstrates, moreover, that postcards addressed to some possible claimants, such as the Hotels Theresa, Gramercy and Wellington, and the 14th Precinct Magistrates Court, all in New York City (R. 59-60), would be delivered without difficulty or forwarding delay.

The appellee assumes too lightly that the appellant here had the duty to send notices. The appellant stands ready to pay all sums due the true owners. It is the appellee which has evaded its duty to give reasonable notice of its claim to escheat.

4. To the appellee's light assumptions on the subject of notice it adds similarly faulty assumptions as to the protection available for the appellant under the Full Faith and Credit Clause. The fullest faith and credit accorded to a Pennsylvania escheat decree cannot protect the appellant against the claims of persons not bound by that decree because of want of due process. Neither will the Full Faith and Credit Clause avail the appellant in a proceeding in another state whose courts properly conclude that the Pennsylvania decree is ineffective because Pennsylvania was unable to seize the *res* and thus assert escheat power.

A state other than Pennsylvania is not required to accord full faith and credit to a Pennsylvania decree which purports to be directed against assets which are not in Pennsylvania. When Pennsylvania undertakes to escheat sums "refundable to senders" California need not consider itself foreclosed from escheating the sum represented by a negotiable draft drawn on a Los Angeles bank and payable to a resident of California. Nor need New York afford full faith and credit to such a Pennsylvania decree when what New York is claiming is money out of funds held at Western Union's domicile in New York and payable not to a sender but to a payee who is in possession of a draft for the amount.

In *Riley v. New York Trust Co.*, 315 U.S. 343, it was made clear that the decision of a Georgia court that a

decedent was domiciled in Georgia could not bind Delaware with respect to assets of the decedent having a situs in Delaware. The Full Faith and Credit Clause did not prevent the Delaware courts from determining that shares in a Delaware corporation should be awarded to a New York fiduciary which satisfied the Delaware judges that the decedent had been domiciled in New York. By the same token Pennsylvania's assertion that funds, payable or held outside Pennsylvania for persons not afforded a proper notice in the Pennsylvania proceeding, are escheatable in Pennsylvania does not bind the courts of other states. *A fortiori* Pennsylvania's attempt to seize the amounts of negotiable drafts over which it has no control whatever and which were not even mentioned in the Pennsylvania proceeding is ineffectual to bind other states.

In spite of Pennsylvania's taking of the appellant's property here, the appellant still remains liable for corresponding amounts of money elsewhere and has thus been deprived of property without due process of law. Western Union cannot, by pleading that all sums "refundable to senders" have been taken by Pennsylvania, keep other states from escheating the amounts of outstanding negotiable drafts and funds due to the payees. Neither can Western Union interpose the Pennsylvania decree as a defense against claimants who are not bound by personal service and who are claiming money as to which Pennsylvania was unable to assert jurisdiction *in rem*. As against individual claimants Western Union is not required to depart from its practice of waiving the statute of limitations. As against other states Western Union could not raise the defense of the statute. Because the Pennsylvania decree does not bind third parties and

other states, the appellant here properly raises the question of due process as to itself: *Anderson National Bank v. Luckett,* 321 U.S. 233, 242-243. The appellee's assumption to the contrary is ill-founded.

5. The appellee's brief discloses that its whole case is based on the idea that mere naked power over a corporation registered to do business in Pennsylvania is all that is needed to escheat the claims of others, wherever they may be, against the corporation. This is the fundamental flaw in the appellee's reasoning, which finds particular application in all the other faulty assumptions and conclusions on which the appellee relies. The error lies in assuming that "sufficient contacts" can be established simply through jurisdiction *in personam* over a defendant without any control over the property to be escheated.

In line with this view of the law the appellee argues at p. 45 of its brief:

> "Whether or not property is within the control of a state within the meaning of the state's escheat statute is a matter for determination by the state courts, subject to review by this Court only in exceptional cases."

The appellee then argues that federal authority cannot be asserted to defeat a State's "sovereign right of escheat." We submit that while this Court sits no state can be permitted to assert such an alleged sovereign right, against the rights of superior claimants and of other states, unless there is also sovereign power over the property to be escheated. Any other conclusion would beg the whole question of sufficiency of contacts and leave the determination of every case solely for the

unilateral decision of a single state. The existence of sufficient contacts is not a question, either of fact or of law, for the unreviewable determination of any state.

We submit that the appellee's brief demonstrates, as well as any argument of ours can show, that Pennsylvania in this case proceeded against the appellant's property regardless of its lack of power over the subject matter, regardless of the rights of claimants to notice comporting with due process, regardless of the rights of states better entitled, regardless of the appellant's rights under the Fourteenth Amendment and regardless of a proper respect for orderly rules regulating the power to escheat within a federal system of government. The Pennsylvania decree should be reversed.

Respectfully submitted,

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Addenda et Corrigenda.

Since the filing of the brief for the appellant, an additional state abandoned property law has become effective. To Appendix B of that brief should therefore be added the Florida Disposition of Unclaimed Property Act, 1961 Laws, c. 61-10, Stats. c. 717, effective Septem-

ber 30, 1961. This new enactment requires publication but no posting of notice. With respect to items of $25 or more it requires that the publication contain names and addresses and that notice be mailed to last known addresses.

Appendix B should be corrected in the following respects: With regard to Massachusetts, the footnote "(2)" should be deleted in the column concerning publication of names and addresses. With regard to New Jersey, the columnar information is correct with respect to the original New Jersey statute; however, under the alternate escheat procedure provided in N. J. Rev. Stat., Title 2A, §§37-29 *et seq.*, publication of names and addresses is required only on items of more than $50; at the same time, unlike the requirements of the original statute, the alternative procedure does require notices by letter or post card to last known addresses.